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In The

Supreme Court of the United States

RICHARD A. VERNON, DIRECTOR, IDAHO DEPARTMENT OF CORRECTION; DAVID PASKETT, WARDEN, IDAHO STATE CORRECTIONAL INSTITUTION; JAMES C. SPALDING, DIRECTOR, IDOC; JOE KLAUSER, WARDEN, ISCI,

Petitioners,

v.

NOEL PUENTE GOMEZ; LEE MAZUR HAYS; BOB JONES; ALFREDO ROMAN; PATRICK HALL; MARQ BARTLETT; GREGORY JOSEPH NELSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case.

STATEMENT OF THE CASE

Prisoners in the custody of the Idaho Department of Correction ("the Department") brought a class action lawsuit for injunctive and declaratory relief, alleging that prison officials retaliated against inmates who challenged the conditions of their confinement through the prison grievance system or the courts. After a nineteen-day bench trial, followed by a lengthy series of evidentiary rulings, hearings and motions, the District Court issued extensive findings of fact and conclusions of law. The District Court's 36-page order, "a model of clarity and detail," App. 13, concluded that the Department's employees repeatedly retaliated against inmates who exercised their right to petition for redress of grievances. It further concluded that policy-making prison officials knew that the inmates were complaining of retaliation, yet never investigated or disciplined any staff member for the retaliatory actions; instead, they condoned the retaliatory actions as a matter of custom and policy. App. 14-15. Based on these findings and conclusions, the District Court entered a declaratory judgment, denied class-wide injunctive relief, and granted narrowly-drawn individual injunctive relief to six inmates. App. 16. The District Court also entered a sanctions order against the

Departments' lawyers for secretly acquiring, photocopying and reading the inmates' confidential attorney-client mail in this litigation over a period of several months, with the assistance of prison law library and correctional staff, in violation of the attorney-client privilege and governing ethical rules. App. 22-23. The Court of Appeals affirmed, finding that the record amply supported the District Court's findings and orders. App. 3.

Petitioners now challenge the Court of Appeals' decision with respect to Plaintiff Bob Jones, one of the six inmates granted injunctive relief. They assert that Jones lacks standing because he suffered only "a subjective, hypothetical chill supported by no evidence that he suffered any adversity or that he curtailed his First Amendment activity." Pet. at 11-12. This argument hinges on a misstatement of the record. The courts below found that Jones did suffer injury and did curtail his First Amendment activity as a result of Petitioners' retaliatory actions. Petitioners are, in effect, asking this Court to reject the District Court's factual findings that (1) Jones' complaints were a legitimate effort to orally grieve his concerns that Department employee Michelle Nelson was impeding inmate access to the courts; (2) Nelson repeatedly sought to have Jones transferred to other prisons; (3) Nelson's efforts were motivated by a desire to punish Jones for his complaints about her professional misconduct; (4) Nelson's alleged legitimate reasons for transferring Jones were pretextual; (5) Nelson's efforts to punish Jones for his complaints were without any discernable penological purpose; (6) Nelson's efforts to transfer Jones were narrowly averted; (7) Nelson's efforts to punish Jones chilled his exercise of his right to complain of Nelson's conduct;

(8) Nelson's retaliatory actions finally caused Jones to resign his prison job; and (9) there was a real threat of future retaliatory transfers. There was ample record support for the lower courts' resolution of these issues, as shown below, and this Court should not revisit them. Petitioners' arguments that Mr. Jones had no standing to bring a retaliation claim because he did not meet the "atypical and significant hardship" requirement of *Sandin v. Conner*, 515 U.S. 472 (1995), or the "actual injury" requirement of *Lewis v. Casey*, 518 U.S. 343 (1996), are simply without merit. Point I, *infra*.

Petitioners also contend that in affirming the District Court's findings and conclusions with respect to Mr. Jones, the Court of Appeals erred because (1) Jones' complaints were not protected speech and therefore punishment for that speech did not constitute retaliation; and (2) even if Jones' speech was protected, the lower court failed to apply *Turner v. Safley*, 482 U.S. 78 (1987), to determine whether prison officials had legitimate penological reasons for limiting that speech. Petitioners raised neither of these arguments in the Court below, and this Court accordingly should not entertain them. Even if they could be raised for the first time in a petition for certiorari, there is no merit to either argument. *See* Points II and III, *infra*.

The record is summarized below.

Mr. Jones became a law clerk at Idaho Maximum Security Institution (IMSI) in 1991. He then became the lead law clerk. [8 Jones 202:25-203:7][1]

The Warden had a high regard for him. [13 Barker 187:21-23, 189:6-13] In 1995, the Associate Warden asked Mr. Jones to develop training materials for other law clerks. [8 Jones 204:1-15, 205:4-7]

In late fall of 1995, the Department hired Michelle Nelson to fill a newly created position, that of Correctional Law Library Specialist at IMSI. Mr. Jones soon began raising concerns with Ms. Nelson about her supervision of the law library. He repeatedly complained to her of her failure to follow Department policy, her frequent absences, and her failure to appear at scheduled appointments with inmates. [8 Jones 207:1-208:10] Ms. Nelson acknowledged that Mr. Jones always made these complaints in a diplomatic manner, and that she never knew him to be anything but a gentleman. App. 55. However, Nelson admitted, she wanted to fire Jones "right off the bat." [7 Nelson 99:17-20] In early 1996, Ms. Nelson did fire Mr. Jones. [8 Jones 234:13-18]

Ms. Nelson claimed that she fired Mr. Jones because a confidential informant had told her that Jones was stealing books from the law library. [7 Nelson 25:5-12] Nelson later admitted, however, that she was aware Jones had only moved the books to his new work station in the room adjoining the law library. [7 Nelson 26:17-27:13]

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[1] Bracketed citations refer to the trial transcripts: day, witness, page: line.

In March 1996, days after Ms. Nelson fired Mr. Jones, Mr. Jones was suddenly transferred from IMSI to another facility, Idaho State Correctional Institution (ISCI). [9 Jones 30:1-18] Ms. Nelson acknowledged that she sometimes worked things out with the move coordinator regarding transfers of inmates, and that in this case she "made sure" that the move coordinator knew that Jones no longer worked in the law library and was therefore eligible to be transferred. [7 Nelson 81:22-82:4; 93:3-8; 94:15-20; 95:24-96:2]

According to Department security and library staff, the normal practice is for inmates who are transferred to take their legal materials with them, or else to receive them shortly after the move. [5 Race 40:14-25; 3 Shedd 172:24-173:12] Ms. Nelson, however, had Mr. Jones' legal files locked away, and ordered that he not be allowed access to them. [8 White 5:13-22; 9 Jones 27:4-19, 31:19-32:1] Ms. Nelson retained Mr. Jones' legal materials for several months. [9 Jones 40:18-24] In barring his access to his criminal files and transcripts, she impaired his ability to assist in his own defense in his pending appeal. [9 Jones 106:4-8]

In February 1997, a year after his transfer, Mr. Jones became a law clerk at ISCI. [9 Jones 32:2-7] In March or April 1997, Michelle Nelson became the law library supervisor at ISCI. [9 Jones 32:2-7, 19-24] The same things that had happened in 1995-96 at IMSI began to happen at ISCI. Ms. Nelson was absent from work, did not show up for scheduled appointments with inmates, and violated Department policies. [9 Jones 33:8-21] Mr. Jones raised his concerns about these matters with Ms. Nelson [9 Jones 33:1-21], and this angered her. [9 Jones 84:15-17] Ms.

Nelson met with the Deputy Warden Gary Barrier and asked him to transfer Mr. Jones to another Department facility in Orofino, Idaho. [6 Nelson 19:2-10, 179:23-181:7, 198:1-8]

Ms. Nelson told Officer Race, a correctional officer assigned to the ISCI law library, that she knew someone in the transfer department and that she could have Jones transferred. App. 55. She told Officer Race that this would be marked down as "coincidence." [9 Jones 34:14-35:3] Officer Race responded that having Jones transferred would be improper because Jones had a state habeas corpus action pending. App. 56. Furthermore, Officer Race thought it would be imprudent to transfer Jones because he was the most experienced law clerk and was an asset to the law library. App. 56. Nelson, however, was unwilling to relent in her pursuit of effectuating the transfer. App. 56. Officer Race interceded on Jones' behalf with the Deputy Warden to prevent the transfer, and ultimately the transfer to Orofino did not take place. *Id.*

At trial, Ms. Nelson initially denied that she had wanted Mr. Jones transferred to Orofino. After reviewing her deposition testimony, however, she admitted that she did want him transferred. At first, she claimed that she wanted him transferred because the Deputy Attorney General had asked Jones to persuade another inmate to accept a settlement offer from the Department, and Nelson felt that she was unwillingly being put "in the middle" of these negotiations. [6 Nelson 182:9-16; 191:2-10; 198:13-21] It transpired, however, that her only involvement had been in placing a telephone call to Jones from the Deputy Attorney General. Ms. Nelson later claimed that she wanted the transfer because she felt

"threatened" by Mr. Jones after she fired him at IMSI. [7 Nelson 96:19-97:10] This justification was also unconvincing since she conceded that she had never known him to behave other than as a gentleman and that he had never threatened her in any way. App. 55.

After Ms. Nelson learned that Jones would not be transferred to Orofino, she became angry and disappointed. App. 56. She became visibly agitated and upset, slamming drawers, cursing, and using a lot of four-letter words. [5 Race 52:21-53:14] Shortly thereafter, she renewed her efforts to have Mr. Jones transferred. App. 56. [5 Race 45:6-7, 51:23-52:4.]

In July 1997, Petitioners selected a number of inmates in their custody for transfer to a prison in Louisiana. They notified the affected inmates by letter and told them to get ready for the move. Mr. Jones was not on the list and did not receive the notification letter. Nevertheless, the morning of the move, the day-shift corporal told Jones that he had just gotten a call from "up front" and that Jones should pack up his things immediately because he was going to Louisiana within the hour. [9 Jones 35:4-36:3; 84:20-22] Mr. Jones told the Deputy Warden that he would challenge the transfer in court. [9 Jones 36:6-13] About an hour later, after Mr. Jones' property had been loaded on the bus, the Deputy Warden told Jones that he would not be transferred to Louisiana after all. [9 Jones 37:6-12] Mr. Jones later learned that another inmate had contacted Plaintiffs' class counsel, who had intervened with the Deputy Attorney General to halt Jones' transfer. [9 Jones 38:15-24]

After the episode in July 1997, Mr. Jones resigned from his job in the law library. He decided that he was doing himself harm by staying under Nelson's supervision, and he tendered his resignation in August 1997. [9 Jones 38:25-39:7]

Mr. Jones was known throughout the institution, from the warden to correctional staff, as a trustworthy and truthful person. [13 Barker 188:9-189:5; 7 White 207:12-21; 5 Race 59:12-14] Officer Race testified that he had never known Mr. Jones to lie, but that he had known Ms. Nelson to lie, and that Ms. Nelson was capable of retaliating against an inmate by having him transferred or fired. [5 Race 31:21-32:27; 55:7-10; 57:1-4; 59:1-16; 73:10-15]

REASONS WHY THE PETITION SHOULD BE DENIED

I. CONTRARY TO PETITIONERS' CLAIM, THE APPELLATE COURT DID NOT HOLD THAT A PRISONERS' CLAIM MAY BE BASED ON A "WHOLLY SUBJECTIVE CHILL," AND THIS CASE DOES NOT PRESENT A CIRCUIT SPLIT

A. Petitioners' Argument Depends Upon Misstatement of the Record

Petitioners argue that Mr. Jones does not have standing because he neither sustained nor was in immediate danger of sustaining an injury as a result of official conduct. Pet. at 8-10 (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). Petitioners claim that the Court of Appeals

affirmed injunctive relief "based on a subjective, hypothetical chill supported by no evidence that [Jones] suffered any adversity or that he curtailed his First Amendment activity" and that "[h]e resigned his job only because he didn't like being supervised by Nelson and he planned to sue her." Pet. at 11-12. This characterization of the record is inaccurate. As summarized above, the July 1997 incident – in which Nelson's effort to have Jones transferred to Louisiana was averted at the eleventh hour through outside intervention – was the culmination of a two-year-long campaign by Nelson, in which she fired him from his job, attempted at least three times to transfer him, falsely accused him of theft and fraud, and interfered over a period of months with his ability to prosecute an appeal of his criminal case. Mr. Jones testified, and the District Court found, that Mr. Jones resigned his job after the episode in July 1997 because he believed that he was doing himself harm by staying under Nelson's supervision. *Cf. Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (noting that the National Labor Relations Board "has long held that an employer violates [the National Labor Relations Act] . . . when it purposefully creates working conditions so intolerable that the employee has no option but to resign – a so-called 'constructive discharge' ").[2]

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[2] Every circuit recognizes constructive discharge as a form of adverse employment action. *See, e.g., Grube v. Lau Indust., Inc.*, 257 F.3d 723, 728 (7th Cir. 2001); *Wardwell v. Sch. Bd. of Palm Beach County, Fla.*, 786 F.2d 1554, 1557 (11th Cir. 1986) (recognizing pre-5th Circuit split authority); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985) (listing cases); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887 (3d Cir. 1984) (listing

Although Petitioners continue to insist that Jones "resigned his job only because he didn't like being supervised by Nelson and he planned to sue her," Pet. at 12, the conclusion of the courts below, that Mr. Jones resigned his job under pressure of Ms. Nelson's relentless efforts to retaliate against him for expressing his concerns about her conduct, App. 15, 55-56, is amply supported by the record.

B. The Court of Appeals' Decision Is Not Inconsistent With Any Decision of This Court

Petitioners argue that the District Court's decision is inconsistent with *Sandin v. Conner*, 515 U.S. 472 (1995), because the injury Mr. Jones suffered was not "atypical and significant in the context of ordinary prison life." Pet. at 10. Jones' claim, however, did not involve a due process challenge to a prison disciplinary proceeding and therefore *Sandin* is inapplicable. *Sandin*, moreover, explicitly notes that prisoners "retain other protection from arbitrary state action even within the expected conditions of confinement," 515 U.S. at 487 n.11, and may invoke the First and Fourteenth Amendments where appropriate

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constructive discharge cases in the 1st, 2nd, 5th, 6th, 8th, 9th, 10th, and D.C. circuits); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975) (noting, "The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.").

without showing that they suffered an "atypical and significant injury." *Id.*

Likewise, Petitioners erroneously contend that the District Court's decision is inconsistent with *Lewis v. Casey*, 518 U.S. 343 (1996), because Jones did not show "that he personally suffered an actual injury in the form of loss or interference with a non-frivolous claim involving his conviction, sentence or conditions of confinement." Pet. at 10-11.[3]

The requirement that injury suffered be "in the form of loss or interference with a non-frivolous claim involving his conviction, sentence or conditions of confinement" applies to claims that prison officials have failed to fulfill their affirmative obligation of providing meaningful access to the courts, not to claims that prison officials violated their negative obligation to refrain from retaliating against inmates for exercising their right of access. *See Crawford-El v. Britton*, 523 U.S. 574 (1998) (recognizing that a prisoner alleging that prison officials deliberately misdirected boxes containing his personal property, in retaliation for his exercise of his First Amendment rights, stated a claim, although the alleged injury did not take the form of loss or interference with a legal claim).

C. The Court of Appeals' Decision Does Not Conflict With the Law in Other Circuits

Petitioners contend that the Ninth Circuit erred in failing to apply "an objective test" to determine whether

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[3] Petitioners did not raise this argument in the Court of Appeals.

a prisoner alleging retaliation has suffered constitutional injury, namely, whether a person of "ordinary firmness" would be deterred by the retaliation from exercising his or her constitutional rights. Pet. at 12-14. According to Petitioners, the Ninth Circuit's decision "illuminates" a conflict between those Circuits which do and those which do not apply the objective test. This case does not present the alleged conflict. The Ninth Circuit currently applies the "ordinary firmness" standard in determining whether a chilling effect rises to the level of a constitutional injury. *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) ("This court has held that government officials violate this provision when their acts 'would chill or silence a person of *ordinary firmness* from future First Amendment activities.' ") (quoting *Mendocino Envt'l Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) (citation omitted)) (emphasis added). Nothing in the decision below suggests that the Court of Appeals did not follow circuit precedent in determining that a person of ordinary firmness would be chilled by Nelson's retaliatory behavior. While the Court of Appeals did not recite verbatim the words "person of ordinary firmness," it stressed that the chilling effect of Nelson's conduct manifested itself in Jones' decision to resign his library job, and made clear that Jones' decision to resign was objectively rational under the circumstances. *See* App. 15 ("The reality is that in the face of repeated threats of transfer because of his complaints about the administration of the library, Jones eventually quit his law library job. . . . It is the chilling effect that *forced* Jones to quit his job" (emphasis added)).

II. PETITIONERS' ARGUMENT THAT JONES' COMPLAINTS WERE NOT ENTITLED TO FIRST AMENDMENT PROTECTION WAS NOT RAISED BELOW AND IN ANY EVENT IS WITHOUT MERIT

Petitioners argue here for the first time that Mr. Jones suffered no retaliation because his complaints about Ms. Nelson's conduct were not entitled to First Amendment protection. Pet. at 20. Since Petitioners never raised this argument in the courts below and the Court of Appeals did not pass upon it, this Court should decline to hear it. *See United States v. United Food, Inc.*, ___ U.S. ___, ___, 121 S. Ct. 2334, 2341 (2001).

Even if that argument had been raised below, and were properly before this Court, it is without merit. Prisoners have First Amendment rights, *see Turner v. Safley*, 482 U.S. 78, 84, 91 (1987), and those rights unquestionably include the right to criticize prison staff for alleged misconduct. *See Crawford-El v. Britton*, 523 U.S. 574 (1998). Retaliation against prisoners for exercising their First Amendment rights, like retaliation against persons in the free world, offends the Constitution because "it threatens to inhibit exercise of the protected right." *Id.* at 588 n.10.

Petitioners also posit that because, under *Lewis v. Casey*, "there is no right to a law library to begin with," inmates have no First Amendment right to criticize prison officials for their operation of an existing law library, and Ms. Nelson was free to retaliate against Mr. Jones for bringing grievances relating to the operation of the library. Pet. at 24. It is irrelevant that prisoners have no "right to a law library." They have a First Amendment

right to complain to prison authorities, in a manner that violates no prison rules, when they believe that their access to the courts is being improperly curtailed.

Petitioners' reliance on *Shaw v. Murphy*, 532 U.S. 223, 121 S. Ct. 1475 (2001), is similarly mistaken. Contrary to Petitioners' argument, *Shaw* does not stand for the proposition that prisoners' complaints are outside the ambit of First Amendment protection simply because they happen to concern the operation of a prison law library. Pet. at 21-24. Mr. Jones, unlike the plaintiff in *Shaw*, claimed no "special right" to provide legal assistance to others, *Shaw*, 121 S. Ct. at 1478. Also in contrast to the claim presented in *Shaw*, Mr. Jones' criticisms of Ms. Nelson's unprofessional conduct violated no prison rule. Petitioners have never even suggested to the contrary; nor have they ever before claimed that Mr. Jones' criticisms of Ms. Nelson were for any reason outside the bounds of protected speech.

III. PETITIONERS' CONTENTION THAT THE DISTRICT COURT ERRED IN NOT APPLYING *TURNER V. SAFLEY* WAS NOT RAISED BELOW AND IN ANY EVENT IS WITHOUT MERIT

Petitioners also argue here, for the first time, that the District Court erred in failing to evaluate Ms. Nelson's treatment of Mr. Jones under the standard set forth in *Turner v. Safley*. Pet. at 25. But even if the argument were properly before this Court, it would have no merit. The District Court did in fact apply *Turner* in finding that Petitioners retaliated against Mr. Jones, App. 40-41, and specifically found that the justifications Nelson offered

for her retaliatory actions were pretextual, and that those actions were "not substantially justified by any discernible penological purpose." App. 58. The Court of Appeals affirmed. App. 15.

Petitioners also attempt to conjure a Circuit split on this issue by showing that the Courts of Appeal "are not unanimous in their views of which types of activity are constitutionally protected," Pet. at 22-23, since some "have held that a provision of legal assistance to other prisoners is not a protected right for retaliation purposes," while others have held that there is "no constitutional right to participate in a prison grievance procedure," and others, "that there is no right to an unlimited use of a prison law library." Pet. at 23. No Circuit, however, holds that prisoners are without a constitutional right to do what Mr. Jones did in this case: orally raise concerns and complaints with his correctional supervisor about her arbitrary conduct, without violating any prison rule or regulation.

CONCLUSION

For the reasons discussed herein, the Petition should be denied.

Respectfully submitted,

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